

PREPARED STATEMENT
OF THE FEDERAL TRADE COMMISSION
FOR THE SPECIAL COMMITTEE ON AGING,
UNITED STATES SENATE
SEPTEMBER 27, 1996

The Commission appreciates this opportunity to provide information to the Committee on the Commission's law enforcement activities regarding the funeral industry.

Congress has charged the Federal Trade Commission with protecting American consumers -- including consumers who find themselves in need of funeral goods or services -- from "unfair methods of competition" and "unfair or deceptive acts or practices" in the marketplace. The Commission's mission is to ensure that consumers benefit from a vigorously competitive marketplace; it does not seek to supplant competition with regulation. The Commission is, first and foremost, a law enforcement agency. The Commission's work is rooted in a belief that free markets work -- that competition among producers and truthful information in the hands of consumers brings the best products at the lowest prices for consumers, spurs efficiency and innovation, and strengthens the economy.

The Commission pursues its goal of promoting healthy competition in the marketplace through two different but complementary approaches. First, for consumers to have a choice of products and services at competitive prices and quality, the marketplace must be free from anticompetitive business practices. Thus, the first part of the Commission's basic mission -- antitrust enforcement -- is to prohibit anticompetitive mergers or other anticompetitive business practices without interfering with the legitimate activities of businesses.

Second, for competition to thrive, curbing deception and fraud is critical. Through its consumer protection activities, the Commission seeks to ensure that the information companies provide to consumers is accurate, not false or misleading. The Commission's primary activity in pursuing its consumer protection mission as to the funeral industry is the enforcement of the Funeral Rule.^{1/}

Antitrust Enforcement in the Funeral Industry

Activities in the funeral industry that may lessen competition and result in noncompetitive prices or lower quality of services for consumers are of concern to the Commission. The principal kinds of conduct or transactions that raise antitrust concerns in this industry are anticompetitive agreements among competitors, attempts to monopolize a market, and mergers and acquisitions that threaten a substantial lessening of competition. The Commission's staff are constantly on the lookout for such activities, and they work closely with state attorneys general in their monitoring and enforcement efforts.

In recent years, the principal antitrust enforcement efforts in the funeral industry have involved potentially anticompetitive mergers and acquisitions. Within the last two years, for example, the Commission has undertaken half a dozen merger

¹ "Funeral Industry Practices; Trade Regulation Rule," 16 C.F.R. Part 453 (1996).

investigations in this industry, four of which resulted in enforcement actions. Each of these cases was resolved through a consent agreement that requires the acquiring firm to divest one or more acquired properties in order to prevent a lessening of competition.^{2/}

An important aspect of the antitrust analysis of mergers in this industry is that the markets for funeral services are very localized. This means that, from an antitrust perspective, a merger or acquisition raises antitrust concerns only to the extent that the transaction will reduce the number of firms in a particular geographic area to such a level that the remaining firm or firms could raise prices or otherwise adversely affect consumers. An acquisition that involves funeral homes or cemeteries in many cities may raise antitrust concerns in only a few, or in none. Even when relatively few firms remain,

² The Commission issued a consent order against Service Corporation International (SCI) in connection with its acquisition of Uniservice Corporation; the consent order requires divestiture of two funeral homes and a cemetery in Medford, Oregon. *Service Corporation Int'l.*, FTC Docket No. C-3579 (Consent Order, May 15, 1995). More recently, the Commission issued another consent order against SCI in connection with its acquisition of Gibraltar Mausoleum Corporation; the order requires SCI to divest a total of seven properties, located in Amarillo, Texas, and Brevard and Lee counties, Florida. *Service Corporation Int'l.*, FTC Docket No. C-3646 (Consent Order, March 21, 1996). In August of this year, the Commission issued two consent orders against The Loewen Group, Inc. in connection with its proposed acquisitions of certain funeral homes in Texas and a chain of funeral homes in the tri-state area of Virginia, Tennessee and North Carolina. The consent orders require Loewen to divest funeral homes in Cameron County, Texas and in Castlewood, Virginia. *The Loewen Group Inc.*, FTC Docket Nos. C-3677 and C-3678 (Consent Orders, August 2, 1996) (Chairman Pitofsky recused).

competition will not necessarily be lessened, because other factors, such as the potential for new firms to enter the market, may keep the market competitive. The Commission remains vigilant for the relatively few transactions that raise serious concerns.

Consumer Protection Enforcement in the Funeral Industry

The Funeral Rule

The Funeral Rule was adopted by the Commission in 1982 and became fully effective in 1984. It has the force and effect of law, and it may be enforced through civil penalty actions in the federal courts. The FTC Act authorizes courts to impose civil penalties of not more than \$10,000 per violation for failure to comply. The Rule covers funeral providers -- that is, industry members that sell both funeral goods and funeral services to the public. Although most funeral providers are funeral homes, other businesses, such as cemeteries and crematories, can also be "funeral providers" within the coverage of the Rule if they market both funeral goods and services. Furthermore, the Rule's requirements apply to both pre-need and at-need funeral arrangements; in pre-need situations, funeral providers must comply with all Rule requirements at the time funeral arrangements are pre-planned.^{3/}

³ Federal courts have imposed civil penalties in two consent decrees between pre-need funeral providers and the Department of Justice, acting on the Commission's behalf, settling charges that
(continued...)

The Rule requires funeral providers to furnish consumers with three basic types of information, which, taken together, enable consumers to select the goods and services they want and to comparison shop for them. First, the Rule ensures that consumers receive itemized price information for the various goods and services that make up a funeral. If a consumer inquires about price over the telephone, funeral providers must give accurate price and other reasonable information about the goods and services they offer. If a consumer comes to the funeral home in person, the Rule requires that the funeral director provide the consumer with a general price list that itemizes prices of each of the funeral goods and services offered by the funeral home. The Rule also requires funeral providers to show consumers a casket price list and an outer burial container price list, if the home's offerings of those items are not itemized on the general price list. At the beginning of any discussion of funeral arrangements, funeral directors must provide a copy of the general price list for the consumer to keep, and must show the casket price list and outer burial container price list before showing the consumer those items.

³(...continued)
the defendants failed to provide pre-need consumers with price lists and itemized statements of funeral goods and services selected, in violation of the Rule. *U.S. v. Mission Plans, Inc.*, Civil Action No. H94-3053 (S.D. Tex., entered September 13, 1994, \$20,000 civil penalty); *U.S. v. Restland Funeral Home, Inc., et al.*, Civil Action No. 3:91CV2576-G (N.D. Tex., entered September 19, 1996, \$121,600 civil penalty).

These requirements apply for both at-need and pre-need situations when funeral arrangements are being made.

The second type of information the Rule requires is a disclosure on the general price list that a consumer may choose only the items he or she desires. Thus, the Rule empowers consumers with the knowledge that they can pick and choose what they want to buy from the itemized general price list. Consumers do not have to purchase a package funeral at a pre-determined price that may include items or services that the consumer does not want but must pay for in order to get the other items in the package. To ensure that consumers' choices are honored by the funeral director, once funeral arrangements are made, funeral directors must give consumers an itemized statement of goods and services selected, listing each good or service selected along with the price for each item and the total cost of arrangements made.

The third type of information the Rule requires concerns disclosures of certain legal requirements and options available to the consumer. For example, the price list must disclose that in most cases embalming is not required by law. Similarly, the price list must disclose that one may use alternative containers for direct cremations, rather than incurring the much greater expense of purchasing a casket.

In addition to ensuring that consumers receive these three basic types of information, the Rule protects consumers by

prohibiting specific practices, such as misrepresenting that embalming is legally required or necessary (when it is not), misrepresenting that a casket is required for direct cremation, misrepresenting that any funeral goods or services have protective or preservative abilities when this is not the case, embalming without consent, or requiring a consumer to purchase any funeral good or service as a condition of purchasing any other good or service. In sum, the information required by the Rule seeks to enable consumers to make informed purchasing decisions at a time of extraordinary stress.

When the Rule was promulgated, it required the Commission to commence a review of the Rule within four years of its effective date. 16 C.F.R. § 453.10 (1982). The Rule became fully effective in 1984. To commence this review, the Commission initiated a Rule amendment proceeding in 1987, which ultimately resulted in the adoption of amendments to the Funeral Rule in 1994.^{4/} The amended Rule went into effect on July 19, 1994.^{5/}

Rejecting proposals to expand coverage to other segments of the industry, the Commission determined that the original Rule was basically sound and still necessary. The Commission therefore retained the core provisions that required itemization,

⁴ 59 Fed. Reg. 1592, Jan. 11, 1994.

⁵ In October 1994, the Third Circuit upheld the amended Rule in a challenge filed by industry members. *Pennsylvania Funeral Directors Ass'n, Inc. v. FTC*, 41 F.3d 81 (3d Cir. 1994).

price, and other material disclosures and that prohibited misrepresentations and other specific deceptive practices. With some "fine tuning," the amended Rule closely tracks the original Rule. For example, the amended Rule retained the requirement for providers to give price information by telephone to all those who request it, but eliminated the original Rule's requirement for funeral providers to volunteer to callers that price information is available by telephone. Similarly, the amended Rule makes clear that casket handling fees are prohibited. Thus, a provider cannot impose fees upon consumers who elect to purchase a casket from another seller. As another example, the amended Rule also clarifies that, if the funeral provider merely removes the deceased for transportation to the funeral home and, at that time, only requests authorization to embalm, the funeral provider is not required to offer a general price list.

Funeral Rule Enforcement

In connection with the reassessment that resulted in the amended Rule, the Commission's staff confronted the sobering fact that even though the Funeral Rule has been in effect for more than a decade, a low level of industry compliance prevailed. A Commission-sponsored 1987 study and a 1988 study conducted by the Gallup organization for the American Association of Retired Persons revealed that little more than one-third (36%) of the funeral industry complied with the Rule's two key requirements: giving consumers a general price list and an itemized final

statement of goods and services. These study results raised questions about the effectiveness of the enforcement approach followed up until then.

To increase industry compliance with the Rule, the Commission's staff recently adopted a new approach that combines increased industry education and stepped-up enforcement. To improve industry education, the Commission's staff prepared and distributed compact, easy-to-understand Compliance Guidelines to help funeral providers comply with the amended Rule. A copy of the Guidelines was mailed to virtually every industry member throughout the nation in June 1994. To redouble our enforcement effort, in late 1994 the Commission's staff initiated an industry "sweeps" approach -- simultaneous law enforcement actions targeting numerous industry members in a particular region, state, or city. Sweeps cases are investigated and prosecuted cooperatively by the Commission staff and the state Attorneys General. The sweeps methodology was designed to raise quickly the overall compliance level with the Funeral Rule's core requirements: giving consumers itemized price lists.

The sweeps are based on "test-shopping" of large numbers of funeral homes in a given geographical area. Each home that is test shopped has previously been sent a copy of the Compliance Guidelines, as well as a copy of the Rule. The test-shopping is performed by FTC and state investigators posing as potential customers. A cluster of FTC and/or state enforcement actions in

a given geographical area are filed and announced after conducting the investigative test-shopping stage of each sweep.

Within the first year of implementing the sweeps strategy, the Commission's staff, with the assistance of the Tennessee, Mississippi and Delaware Attorneys General, conducted four sweeps, one in each of those states, plus a pilot sweep conducted by FTC staff alone in Florida. Additional sweeps in other regions are being implemented, but the results are not yet public. The four initial sweeps, involving test shoppings of 89 funeral homes, resulted in 20 FTC enforcement actions^{6/} -- nearly half as many as were brought in the previous decade since the Rule went into effect. The various sweeps show that compliance with the Rule's core provisions has improved since initiation of the new enforcement approach; the compliance rate has ranged from 60 to 80 percent from sweep to sweep.

Enforcement actions arising from the sweeps, like almost all of those brought prior to implementation of the sweeps methodology, have been resolved before filing through consent agreements. Nearly all of the consent agreements include a civil penalty commensurate with the alleged law violations committed by each funeral home. The deterrent effect of the sweeps, however, derives not only from the amount of the civil penalties in each

⁶ As a result of the Tennessee sweep, the State of Tennessee also brought four additional actions of its own.

individual case, but also from the much greater likelihood that non-compliance will be detected.^{7/}

Industry Self-Regulation

The first round of sweeps revealed two facts. First, while compliance has increased since initiation of the new enforcement approach, the compliance rate, ranging from 60 percent to 80 percent depending on the region, could still be improved upon. Second, the funeral industry has taken notice of the new enforcement approach, appreciates the seriousness of the noncompliance problem in terms of its reputation, and very much wants to work with us in correcting this problem.

⁷ The FTC Act provides for the imposition of civil penalties of up to \$10,000 for each violation of the Funeral Rule or any other FTC Trade Regulation Rule. 15 U.S.C. § 45(m)(1)(A). Civil penalties in non-sweeps cases have ranged from \$10,000 to \$100,000, with the average at about \$30,000. In calculating the civil penalty in each case, a violator's ability to pay is one of the statutory factors that a court must consider in imposing a civil penalty. 15 U.S.C. §45(m)(1)(C). (The other factors that must be considered are the "degree of culpability, history of prior such conduct, effect on ability to continue to do business, and such other matters as justice may require.") Thus, the range and average of penalties necessarily reflect the fact that the industry is largely composed of small businesses. Because the sweeps investigations are streamlined, focusing upon only violations of the "core" Rule provisions, the civil penalties in sweeps cases have been somewhat lower (\$1,000 to \$35,000) than in conventional cases that entailed a more exhaustive investigation documenting a greater number and range of alleged law violations.

In September 1995, the National Funeral Directors Association (NFDA) submitted a proposal to the Commission, which the Commission approved and is now implementing, for a two-fold industry self-certification and training program to increase Rule compliance. NFDA's action represents a turn of events in the Commission's relationship with the funeral services industry. The NFDA had more characteristically been opposing the Commission in rulemaking proceedings or litigation^{8/} rather than assisting the Commission to promote compliance with the Funeral Rule. NFDA's action represents a meaningful commitment to self-regulation that, the Commission suggests, may do more to benefit consumers than would continued reliance only on case-by-case enforcement.

The first component of this new NFDA-sponsored program is the Funeral Rule Offenders Program ("FROP"), which offers a non-litigation alternative for correcting apparent "core" Rule violations--where test-shopping reveals that funeral homes seem to have failed to provide the price lists required by the Rule. FROP is designed to encompass only apparent violations of these core Rule provisions, and the Commission in its sole discretion may choose not to offer the FROP alternative. Violations of other Rule provisions, such as embalming without consent or

⁸ NFDA joined with the Pennsylvania Funeral Directors Association in challenging the amendments to the Funeral Rule adopted on January 11, 1994. *Pennsylvania Funeral Directors Inc. v. FTC* 41 F.3d 81 (3d Cir. 1994).

imposing illegal tying arrangements, are outside the scope of FROP and will continue to be addressed through conventional Commission law enforcement procedures.

A funeral home identified by investigators as having failed to provide the required price lists to test-shoppers, whether or not a member of NFDA, may be offered the choice of a conventional investigation and potential law enforcement action resulting in a federal court order and payment of a civil penalty, or participation in FROP. Violators choosing to enroll in FROP make payments to the U.S. Treasury equal to 0.8% of average annual gross sales, which is generally less than the amount that the Commission would seek as a civil penalty. FROP participants also undergo compliance review by NFDA counsel, and schedule NFDA-led, on-site training and competency testing on Rule compliance for all their employees, in both pre-need and at-need situations. The NFDA, which collects a fee from FROP participants for administering the program, has undertaken to keep records on homes that are enrolled in the FROP program and to make these available for review by the Commission's staff. Violators remain in the FROP program for five years and certify completion of the FROP requirements to the NFDA. The Commission will announce the number of referrals to FROP in a quarterly press release, but since no formal legal action is taken, no individual funeral home will be identified. Of course, this information is available under the Freedom of Information Act.

The incentives for funeral homes to participate in FROP, rather than sustain a formal enforcement action by the Commission, include: (1) expedited informal resolution, resulting in reduced legal fees; (2) in lieu of a civil penalty, a payment to the Treasury that may be lower than a civil penalty resulting from an enforcement action; (3) certainty of outcome; and (4) less public exposure. FROP is also expected to deter funeral homes from violating the Rule, because it includes payments to the Treasury that are substantial enough to be treated as more than a mere cost of doing business, as well as five years of compliance training and monitoring. Deterrence also should be enhanced because a funeral home opting to participate in FROP may have a heightened concern that, having once come to the Commission's attention, it may be more exposed to future Commission investigation or enforcement.

FROP should enable the Commission to achieve better compliance with the Funeral Rule while expending fewer resources. The Commission's history of Funeral Rule enforcement demonstrates that the process of a full investigation, consent negotiations, referral of both settled and unsettled complaints to the Department of Justice,^{9/} collection of civil penalties, and

⁹ Under Section 16 of the FTC Act, the Commission is required to refer to the Department of Justice for filing and litigation any law enforcement action involving imposition of any civil penalty for violation of a Trade Regulation Rule. If the Department of Justice does not act on the referral within 45

(continued...)

monitoring of order compliance consumes a level of resources that is disproportionate to the size of the businesses usually involved in such enforcement actions. FROP's benefits to the Commission are lower-cost resolution of basic Rule cases; the freeing of resources that then may be directed to other pressing law enforcement matters, such as hard-core fraud cases; the shifting of some of the compliance burden to an industry partner; and the likelihood of increased compliance by industry members with the Funeral Rule.

By implementing FROP, while continuing to maintain some traditional enforcement presence in those instances that merit fuller investigation, we can encourage greater compliance and thus achieve greater protection for consumers. Early indications are that this is happening. Recent non-public sweeps conducted in the Midwest revealed a compliance rate exceeding 95 percent. In fact, in one sweep, investigators shopped 25 homes in and around a major city and found all in compliance. The Commission is greatly encouraged by these results and anticipates that they are the harbinger of a new trend in the funeral industry.

The second component of the Commission-approved NFDA industry self-certification and training program is the Funeral Industry Rule Compliance Assurance Program -- "FIRCAP." FIRCAP

⁹(...continued)
days, the Commission is authorized to file and litigate the matter on its own behalf. 15 U.S.C. § 56.

is a voluntary program of compliance review and training, for which the Commission serves solely as an advisor. Any funeral home, including a former FROP participant that has successfully completed that program, is eligible to join FIRCAP, regardless of whether it is a member of NFDA.

FIRCAP is designed to encourage industry compliance through continuing training by the NFDA. Participants in FIRCAP certify to NFDA that all licensed funeral directors employed by the participant have completed NFDA's comprehensive Rule training program and adopt a written policy, distributed to all licensed personnel, regarding distribution of price lists and information to consumers. Participation in FIRCAP may become an asset for funeral homes in marketing their services to consumers. FIRCAP guidelines, however, expressly forbid any reference to the Commission in such marketing efforts.

The FROP and FIRCAP programs, under the aegis of the primary industry trade association, evidence a new attitude of cooperation on the part of the industry. These programs promise to remedy the problem of low compliance which our law enforcement and industry education efforts to date have not been fully successful in addressing.

Thank you again for this opportunity to describe for the Committee the Commission's law enforcement efforts to promote competition and protect consumers in the funeral industry. The

Commission will be pleased to provide any further information that may be of assistance to the Committee.